Puncak Niaga Holdings Bhd v NS Water Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D8–22–954 OF 2003
ABDUL WAHAB SAID JC
10 SEPTEMBER 2003

Civil Procedure — Injunction — Question of balance of convenience — Factors to be considered — Whether against public policy to impose on the State Government — Public interest

Contract — Estoppel — Estoppel by conduct — Memorandum of Understanding — Validity of MOU expired — Both parties continue to deal with the State Government — Whether this led the Plaintiff to believe that the MOU will be extended

Contract — Terms — Construction — Memorandum of Understanding — Whether an MOU is a binding agreement — Terms of the agreement to be looked at — Whether specific performance should be granted — Specific Relief Act 1950 s 20(1)(b), (c) and (g)

The plaintiff in this case is aggrieved that the defendants had sought to exclude it from further taking part in a consortium it had participated in since 2000, by allegedly terminating a memorandum of understanding ('MOU') it had previously executed together with the defendants. The consortium had been working towards the finalization of a concession agreement of a water privatization project in the state of Negeri Sembilan. The validity of the MOU was extended from time to time vide a number of supplemental agreements. The last supplemental agreement was dated 12 August 2002, extending the validity of the MOU to 31 December 2002. The plaintiff contended that even though the validity of the third supplemental agreement had expired on 31 December 2002, the plaintiff and defendants had been dealing with the State Government, UPEN and EPU as usual in procuring and finalizing the concession agreement. The plaintiff alleged that the defendants, through their conduct and actions, coupled with the fact that the State Government had extended the validity of the award from 30 December 2002 to 30 June 2003, had led the plaintiff to believe that the MOU will be extended. Among the reliefs sought by the plaintiff were interlocutory and permanent injunctions prohibiting the defendants from dealing with the third party and the State Government. The plaintiff also sought declaratory orders that the termination of the MOU was not valid, that the plaintiff is still a member of the consortium, and specific performance of the MOU. In view of the fact that the termination was abrupt and for no reason, which the defendants themselves were perplexed, the court granted the ex parte interim injunction and fixed an inter partes hearing date. Subsequently, the first and third defendants filed an affidavit opposing the ex parte injunction (encl 13), whilst the second defendant filed a summons in chambers with a certificate of urgency to set aside the ex parte injunction (encl 11).

Held, setting aside the ex parte injunction:

(1) Estoppel by conduct had been rightly raised by the plaintiff. If the defendants had wanted to use cl (5) of the MOU ie termination upon lapse of six months of the third supplemental agreement, they should at the earliest instance after 31 December 2002 when the MOU terminates by affluxion of time, disassociate themselves instead of attending to the finalization of the concession with the State and Federal EPU until even in April 2003. In the circumstances, there was a bona fide serious issue to be tried ie whether the MOU had lapsed on 31 December 2002 or had been extended by conduct of the first defendant at least until 30 June 2003 ie the extension period then granted by the State Government to the concession company (see paras 55, 56).

(2) Whether an MOU was a binding agreement, the court must look at the terms of the agreement. Looking at the MOU it was clear that it primarily necessitated the signing of a shareholders' agreement which terms were still at large and subject to agreement by both parties. It was not just a mere formality. However, it was still the duty of the court to determine whether on the factual matrix it gave such rights for an extension of six months to the plaintiff. At this stage of the interlocutory application where pleadings and evidence were incomplete, the court should refrain from making any determination on the merits of the claim. Further also at this stage of the proceeding it was not the function of the court to come to any specific finding of facts or conclusion. As long as the claim was not frivolous or vexatious this should be dealt with at the trial (see paras 58, 62, 63).

(3) As for specific performance of the MOU, on perusal of the draft Shareholders' Agreement for the successful implementation of the consortium, besides signing of the Shareholders' Agreement, parties shall concurrent with that execution, execute two further shareholder agreements under the terms of which they shall participate as shareholders in two companies ie the water treatment company and the operation and maintenance company where the plaintiff would hold controlling interest (cl 8.2). This indeed was an added obstacle for any grant of specific performance as the draft agreements were still forthcoming. The MOU was not capable of being specifically enforced under those provisions of the Specific Relief Act. If a contract is such as not to be capable of being specifically enforced no injunction can be granted to prevent its breach (*Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283) (see paras 65, 66, 67).

(4) Order 29 r 2A of the Rules of High Court 1980 requires full and frank disclosure at the ex parte stage and they must be strictly complied by parties and enforced by courts. The plaintiff had failed to disclose the Principal Agreement which was materially relevant to the plaintiff's participation in the concession. The Principal Agreement struck at the core of the MOU (see paras 79, 83).

(5) When considering the balance of convenience, one of the factors to be considered is whether damages would be a sufficient remedy. A continuation of the injunction would delay the long awaited desire of the State Government to proceed with the privatization of the water supply in the state and it would be against public policy to so impose on the State Government. In determining the balance of convenience any question going to the public interest may in an appropriate case be taken into account. Such privatization of the water supply in the state would definitely benefit the public and any delay in its implementation would frustrate public interest (see paras 91, 93, 94).

[Bahasa Malaysia summary

Plaintif di dalam kes ini terkilan kerana defendan-defendan cuba tidak memasukkan plaintif daripada mengambil bahagian di dalam satu konsortium yang plaintif telah mengambil bahagian sejak tahun 2000, dengan menamatkan satu memorandum persefahaman ('MP') yang ia telah melaksanakan dengan defendan-defendan. Konsortium itu sedang bekerja ke arah penyelesaian perjanjian konsesi berkenaan projek penswastaan air di Negeri Sembilan. Keesahan MP itu telah dilanjutkan dari masa ke semasa melalui beberapa perjanjian tambahan. Perjanjian tambahan yang terakhir bertarikh 12 Ogos 2002, melanjutkan keesahan MP itu kepada 31Disember 2002. Plaintif telah mengatakan bahawa walaupun keesahan perjanjian tambahan ketiga telah luput pada 31 Disember 2002, plaintif dan defendan-defendan telah berurusan dengan Kerajaan Negeri, UPEN dan EPU seperti biasa di dalam mendapatkan dan menyelesaikan perjanjian konsesi. Plaintif berkata bahawa defendan-defendan, melalui tingkah laku mereka, bersama dengan fakta bahawa Kerajaan Negeri telah melanjutkan keesahan award daripada 30 Disember 2002 sehingga 30 Jun 2003, telah menyebabkan plaintif percaya bahawa MP itu akan dilanjutkan. Di antara relif-relif yang dipohon plaintif adalah injunksi-injunksi interlokutari dan kekal menyekat defendan-defendan daripada berurus dengan parti ketiga dan Kerajaan Negeri. Plaintif juga memohon perintah perisytiharan bahawa penamatan MP itu tidak sah dan bahawa plaintif masih adalah ahli konsortium itu, dan pelaksanaan spesifik MP itu. Memandangkan bahawa penamatan adalah secara tiba-tiba dan tanpa alasan, di mana defendan-defendan sendiri juga bingung, mahkamah membenarkan injunksi interim ex parte dan memberikan tarikh pendengaran inter parte. Kemudiannya, defendan-defendan pertama dan ketiga memfailkan satu afidavit membangkang injunksi ex parte itu (kandungan 13), sementara defendan kedua memfailkan saman dalam kamar dengan sijil tindakan segera untuk mengenepikan injunksi ex parte itu (kandungan 11)

Diputuskan, mengenepikan injunksi ex parte:

(1) Estopel melalui tingkah laku telah dibangkit dengan betul oleh plaintif. Defendan-defendan ingin menggunakan kl 5 MP itu, iaitu penamatan setelah luput enam bulan perjanjian tambahan ketiga, mereka patut,

pada awalnya selepas 31 Disember 2002 apabila MP itu ditamatkan oleh peluputan masa, memisahkan diri mereka dan bukan menghadiri penyelesaian konsesi dengan EPU Negeri dan Persekutuan sehingga April 2003. Di dalam keadaan ini, terdapat isu bone fide untuk dibicarakan, iaitu sama ada MP telah luput pada 31 Disember 2002 atau telah dilanjutkan oleh tingkah laku defendan pertama sekurangnya hingga 31 Jun 2003, iaitu tempoh lanjutan yang telah diberi pada masa itu oleh Kerajaan Negeri kepada syarikat konsesi (lihat perenggan 55, 56).

(2) Sama ada MP adalah perjanjian yang mengikat, mahkamah mesti melihat terma-terma perjanjian. Adalah jelas daripada MP itu bahawa ia memudahkan tandatangan pada perjanjian pemegang syer yang terma-termanya masih belum dipersetujui oleh parti-parti itu. Ia bukan hanya formaliti. Walau bagaimanapun, ia masih tanggungjawab mahkamah untuk menentukan sama ada pada fakta-fakta ia memberi plaintif hak untuk lanjutan selama enam bulan. Pada tahap permohonan interlokutari ini di mana pliding-pliding dan keterangan masih belum selesai, mahkamah tidak harus membuat sebarang keputusan pada merit-merit tuntutan itu. Lagipun pada tahap prosiding ini ia bukan fungsi mahkamah untuk sampai ke sebarang keputusan yang khusus atau kesimpulan. Asalkan tuntutan itu tidak remeh dan menyusahkan ia patut dibicarakan pada perbicaraan (lihat perenggan-perenggan 58, 62, 63).

(3) Mengenai pelaksanaan spesifik MP itu, pada penelitian draf perjanjian pemegang syer untuk pelaksanaan konsortium itu, selain daripada menandatangani perjanjian pemegang syer, parti-parti mesti serentak dengan pelaksanaan itu, melaksanakan dua perjanjian pemegang syer di bawah terma-terma di mana mereka mesti serta sebagai pemegang syer di dalam dua syarikat, iaitu syarikat perawatan air dan syarikat operasi dan penyelengaraan di mana plaintif akan memegang kepentingan kawalan (kl 8.2). Ini merupakan rintangan tambahan kepada pemberian pelaksanaan spesifik memandangkan perjanjian draf masih akan datang (lihat perenggan-perenggan 65, 66, 67).

(4) Aturan 29 k 2A Kaedah-Kaedah Mahkamah Tinggi 1980 memperuntukkan pendedahan penuh dan terus terang pada tahap ex parte dan ini mesti dipatuhi oleh parti-parti dan dikuatkuasakan oleh mahkamah. Plaintif telah gagal mendedahkan Perjanjian Utama yang relevan kepada pengelibatan plaintif di dalam konsesi itu. Perjanjian Utama merupakan teras kepada MP itu (lihat perenggan-perenggan 79, 83).

(5) Semasa mempertimbangkan imbangan kemudahan, satu faktor untuk dipertimbangkan adalah sama ada ganti rugi akan menjadi remedi yang mencukupi. Sambungan injunksi akan melambatkan niat Kerajaan Negeri untuk terus dengan penswastaan bekalan air di dalam negeri dan ia akan melanggar kepentingan awam untuk berbuat seperti itu kepada Kerajaan Negeri. Di dalam mempertimbangkan imbangan kemudahan sebarang persoalan atas kepentingan awam boleh di dalam kes sesuai dipetimbangkan. Penswastaan bekalan air di dalam negeri akan membawa faedah kepada orang awam dan sebarang kelewatan didalam penguatkuasaan akan melanggar kepentingan awam (lihat perenggan-perenggan 91, 93, 94).]

Notes

For cases on balance of convenience, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2483–2486.

For cases on estoppel by conduct, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3102–3110.

For cases on construction of terms, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 4642–4662.

For interlocutary injunctions, see 1 *Halsbury's Laws of Malaysia*, paras [10.5-027].

Cases referred to

Ali & Fahd Shoboksi Group Ltd v Moneim & Ors [1989] 2 All ER 404 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (refd)

Lim Hong Liang & Anor v Tan Kim Lan @ Tan Kim Leng & Anor [1997] 5 MLJ 157 (refd)

Lim Keng Siang & Anor v Yeo Ah Tee [1983] 2 MLJ 39 (refd)

Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd [1993] 3 MLJ 527 (refd)

MRK Nayar v Ponnusamy & Ors [1982] 2 MLJ 174 *Bakmawar Sdn Bhd v Malayan Banking Bhd* [1992] 1 MLJ 67 (refd)

Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia [1988] 1 MLJ 302 (refd)

R v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac [1917] 1 KB 486 (refd)

Teh Poh Wah v Seremban Securities Sdn Bhd [1996] 1 MLJ 701 (refd)

Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v Dato James Lim Beng King [1989] 2 MLJ 249 (refd)

Vethanayagam v Karuppiah & Ors [1968] 1 MLJ 283 (folld)

Legislation referred to

Contracts Act 1950 s 24(e)
Rules of the High Court 1980 Order 29 r 2A
Specific Relief Act 1950 ss 20(1)(b), (c), (g), 21(2)(a)

Alvin John (Celine Selladurai with him) (Shahrizat Rashid & Lee) for the plaintiff
Ahmad Moosdeen (Chan, Moosdeen & Partners) for the first and third defendants
M Rueben (Eugene Jayaraj with him) (Zaid Ibrahim & Co) for the second defendant

Abdul Wahab Said JC:

[1] The plaintiff in this case is aggrieved that the defendants had sought to exclude it from further taking part in a consortium it had participated in since 2000, by allegedly terminating a memorandum of understanding ('MOU') it had previously executed together with the defendants.

[2] The consortium had been working towards the finalization of a concession agreement of a water privatization project in the state of Negeri Sembilan.

[3] The plaintiff filed the suit now before this court on 10 June 2003.

[4] In the statement of claim, the plaintiff said despite the fact that the parties had been working towards finalizing the Concession Agreement since 2000 and an MOU was signed in furtherance of that objective, the defendants for no apparent reason had terminated the MOU and are negotiating with the State Government to bring in a third party in place of the plaintiff.

[5] Among the reliefs sought by the plaintiff are interlocutory and permanent injunctions prohibiting the defendants from dealing with the third party and the State Government.

[6] The plaintiff also sought declaratory orders that the termination of the MOU was not valid, that the plaintiff is still a member of the consortium, and specific performance of the MOU.

[7] In addition to that, the plaintiff had sought general and punitive damages from the first defendant specifically, for wrongful termination of the MOU.

[8] The plaintiff filed an ex parte summons in chambers with a certificate of urgency on the same date, for interim injunction (encl 4). The summons in chambers is supported by an affidavit, deposed by Ruslan bin Ahmad, Executive Vice Chairman of the plaintiff (encl 3).

[9] It was deposed that vide a letter of intent dated 16 April 1997, the Negeri Sembilan State Government had awarded a privatization project for the sourcing, treatment and supply of water to a consortium known as 'IMS Water Consortium' consisting of Arab Malaysian Development Bhd. The first, second and third defendants ('RH-1'). For the purposes of implementation, a single purpose company must be formed.

[10] It was a condition in the letter that no substantial changes to the share equity structure are to be made without the prior approval of the State Government.

[11] The State had been extending the validity of the award pending negotiations, and by a letter dated 26 December 2002 from UPEN ('RH-3'), the validity of the State Government's award was extended until 30 June 2003.

[12] It started off as a consortium of defendant (1) and Arab Malaysian Development Bank but subsequently, due to the economic climate at that time, after obtaining the approval of the State Government, it withdrew from the consortium and was replaced by a French company. When the French company also withdrew on 9 October 2000, on the request in writing of the consortium company and subsequent approval of the State Government, the plaintiff was made a member in place of the French Company.

[13] Pursuant to the approval by the State, a memorandum of understanding ('MOU') was executed by the plaintiff, the first, second and third defendants. **A**

[14] Among the terms of the MOU are that:

(1) The parties are to work together in order to procure all the necessary resources to achieve the common goal of implementing the privatization project in accordance with the aims and objectives of the State's privatization policy and provisions of the Water Supply Enactment 1997. **B**

(2) The shareholding of the consortium company shall be as follows:

(i)	first defendant	33.5%
(ii)	plaintiff	30.0%
(iii)	second defendant	26.5%
(iv)	third defendant	10.0%

C

(3) Pending the finalization of the privatization project, the parties are not to deal with any third party. **D**

(4) The MOU comes into force from its date of execution and shall terminate upon the earliest of any of the following:

(i) The execution of a shareholder's agreement by the parties in a form to be mutually agreed; or

(ii) The State Government has indicated that the privatisation project will not be awarded to the Company; or **E**

(iii) The MOU is terminated by the mutual agreement of the parties; or

(iv) The date which is six months from the date of the MOU unless a later date is agreed by the parties. **F**

[15] The validity of the MOU was extended from time to time vide a number of supplemental agreements. The last supplemental agreement was dated 12 August 2002, extending the validity of the MOU to 31 December 2002.

[16] The plaintiff contended that even though the validity of the third supplemental agreement had expired on 31 December 2002, the plaintiff and defendants had been dealing with the State Government, UPEN and EPU as usual in procuring and finalizing the Concession Agreement. **G**

[17] The plaintiff alleged that the defendants, through their conduct and actions, coupled with the fact that the State Government had extended the validity of the award from 30 December 2002 to 30 June 2003, had led the plaintiff to believe that the MOU will be extended. **H**

[18] Further, the plaintiff said that at all material times, the defendants had not raised any difficulty, problems or dispute between them and the defendants and therefore they (the plaintiff) had no reason to worry about extension of the validity of the MOU. (Notices and minutes of the meetings were exhibited 'RH-8'). **I**

[19] On 9 May 2003, the first defendant wrote to the plaintiff informing the company that the MOU had lapsed or terminated and therefore the plaintiff had no right to call any meeting whatsoever with regards to the project (exh 'RH-9').

[20] By a letter dated 19 May 2003 (exh 'RH-10') the plaintiff contended that the termination of the MOU was unlawful and that it will not agree with the contents of the first defendant's letter dated 9 May 2003. Meanwhile, the plaintiff went on with its work in the consortium as usual, calling the members for a meeting.

[21] This had prompted the first defendant to write to the plaintiff saying that since the MOU is no longer valid, they will not be attending any of the meetings.

[22] The plaintiff further wrote to the first defendant on 30 May 2003 (exh 'RH-12') saying that since the negotiations with the State Government was almost finalized and that the Concession Agreement was almost ready to be signed, the plaintiff and defendants should sign the shareholders' agreement and invited the defendants to come to a meeting seven days from the date thereof. However, the defendants did not respond.

[23] Subsequently the plaintiff heard from a reliable source that the first defendant had intended to enter into an agreement with a third party regarding the consortium and concession for the water privatization project.

[24] The plaintiff said that the first defendant had acted mala fide in purportedly terminating the MOU. The particulars of the mala fides are as follows:

(i) The first defendant had not given any notice to the plaintiff of its intention to terminate the MOU.

(ii) The first defendant had, whilst the MOU was still valid and subsisting, negotiated with a third party for the purpose of selling their shareholding and the plaintiff's shareholding in the consortium,

(iii) The first defendant had purportedly terminated the MOU at a stage when the Concession Agreement was almost ready to be signed by the consortium and the State Government.

[25] On the basis of this application and the urgency of the matter and in view of the fact that the termination was abrupt and for no reasons, which defendants themselves were perplexed, the court granted the ex parte interim injunction and fixed an inter partes hearing date.

[26] Subsequently, the first and third defendant filed an affidavit opposing the ex parte injunction (encl 13), whilst the second defendant filed a summons in chambers with a certificate of urgency to set aside the ex parte injunction (encl 11).

[27] The first and third defendants, in their affidavit, deposed by Dato' Azhar bin Hashim a director of the first defendant (encl 13) did not dispute the factual matrix of the case in paras 4 to 9 of the plaintiff's affidavit.

[28] When the Negeri Sembilan State Government called for tenders to award the concession for the water privatization project, both the plaintiff and the defendants tendered for it. The defendants were selected for the consortium while the plaintiff had lost out.

[29] In mid 2000, the year when the French Company withdrew from the consortium, Tan Sri Rozali bin Ismail, Executive Chairman of the plaintiff approached the consortium to participate in the concession.

[30] The consortium agreed, subject to Tan Sri Rozali paying Dato' Azhar bin Hashim and Dato' Dr Rahiman bin AS Dawood, Directors of the first defendant a premium of RM106m in stages.

[31] Subject to the above, and the State Government's approval, Tan Sri Rozali or his nominee would be allowed to subscribe for 30% of the share capital in the consortium at par value.

[32] The above objectives were incorporated in an agreement, known as the 'Principal Agreement', executed on 19 January 2002 ('AH-2' of encl 13) between Tan Sri Rozali and both the directors of the defendants. Of the RM106m the first payment of RM5m had been paid to them.

[33] It was stipulated in the Principal Agreement that the parties may renegotiate the amount payable by Tan Sri Rozali. However, if the parties cannot agree, any party may terminate the Principal Agreement, upon which Tan Sri Rozali will have to withdraw his 30% shareholding in the Concession Company.

[34] Pursuant to this, the MOU was made between the plaintiff (Tan Sri Rozali's nominee) and the first, second and third defendants on 20 December 2002 ('AH-3' encl 13).

[35] After the parties entered into the Principal Agreement and the MOU, various meetings with the State Government and the Economic Planning Unit of the Prime Minister's Department concerning the terms of the concession agreement were held, the last being on 20 April 2003.

[36] Problems begin to surface when the parties could not agree on the premium to be paid as suggested by Tan Sri Rozali through his representatives, ie his vice chairman and one Mdm Loong.

[37] Tan Sri Rozali and his representatives proposed figures much lower than the previously agreed RM106m purportedly based on the reasoning that the variables, namely OPEX (Operating Expenditure), CAPEX (Capital Expenditure) and tariff had changed, so the amount under the Principal Agreement would also change. A figure of RM43.5m was proposed and was subsequently increased to RM70.27m.

[38] As the defendants did not agree with the figure, they sent a letter dated 30 April 2003 to Tan Sri Rozali, terminating the Principal Agreement. The defendants subsequently by letter dated 9 May 2003 referred to the above letter and reminded the plaintiff that the MOU had also lapsed or terminated ('AH-S' encl 13).

[39] The consortium discussed with the State Government and subsequently wrote to the Menteri Besar, citing its problems with the plaintiff, requesting the approval of the State Executive Council to replace the plaintiff with Eurologic Sdn Bhd. The request was brought to the State Executive Council Meeting on 21 May 2003 and approval to the substitution was granted.

[40] The first and third defendants further averred that the State Government came up with this solution that the first defendant and the plaintiff are not to be the members of the consortium so that any legal dispute concerning Tan Sri Rozali, the plaintiff, the first defendant and its directors will not hold back the implementation of the concession.

[41] The State Government also agreed that Sarawak Concrete Industries Sdn Bhd, a public company listed on the second board of the KLSE, as suggested by the first defendant be put in place of the first defendant and the plaintiff, through Eurologic Sdn Bhd.

[42] Further, the first and third defendants said that this injunction serves no purpose since the State Government had already decided that the first defendant and the plaintiff are no longer to be part of the concession company.

[43] The second defendant's affidavit (encl 10) in support of its application to set aside the ex parte injunction also raised the same issue of material non-disclosure by the plaintiff. In essence it referred to cl 6.4, which required the extension of the MOU to be in writing in the form of supplemental agreements, the last being in December 2002.

[44] The plaintiffs in their reply vide two affidavits deposed by Tan Sri Rozali Ismail, Executive Chairman of the plaintiff (encl 21) and Ruslan bin Hassan, Executive Vice Chairman of the plaintiff (encl 20), denied the first and third defendants' averment that the refusal of Tan Sri Rozali to pay the RM106m was the factor that caused the termination. Tan Sri Rozali also denied that he had told the defendants that they could bring in any other company in the plaintiffs' place, since he was, after all, going to withdraw from the consortium.

[45] Tan Sri Rozali also averred that in fact, he had maintained his interest in the consortium but merely asserted to the defendants that since the variables to the tariff structure had changed, the amount due under the Principal Agreement would also change.

[46] Ruslan bin Hassan in his affidavit (encl 20) exhibited the draft Shareholders' Agreement dated 13 February 2001 and letters from the plaintiff to the defendants and their solicitors on the draft, and stated that the terms of the agreement were agreed.

[47] Based on those primary facts, counsel for the parties put forth various issues which will be dealt with separately. At the outset, in dealing with this application the guidelines as enunciated in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 were followed.

Bona fide serious issues to be tried

[48] The plaintiff contended that there are serious issues to be tried and listed them as follows:

(i) whether the termination of the MOU was unlawful, in breach of the terms of the agreement, unconscionable and mala fide*;*

(ii) whether the validity of the MOU had lapsed;

(iii) whether the first defendant, through its actions and conduct after 31 December 2002, is estopped from asserting that the validity of the MOU had lapsed; and

(iv) whether the first defendant, through its conduct after 31 December 2002 had waived its rights in insisting that time is of the essence in the said MOU.

[49] The defendants instead contended that there are no serious issues to be tried. There is no dispute that the validity of the MOU has lapsed. The specific provisions of the MOU has put those questions to rest.

[50] The first and third defendants went on to say that cl 5 of the MOU confirms that it is not a binding agreement, as it has provision for termination if the parties did not finalize and agree upon the terms of the Shareholders' Agreement. Since the parties had not entered into the Shareholders' Agreement which terms are not settled, the main purpose of the MOU is not met and it therefore lapses by virtue of cl 5.

[51] The first and third defendants further states that the plaintiff cannot claim for specific performance of the MOU, since the MOU on its own is only a preliminary document and is devoid of any contractual effect if its primary purpose ie the signing of the Shareholders' Agreement is aborted.

[52] The plaintiff's claim is based solely on the MOU and specific performance. Counsel for plaintiff contended that it is not merely a loose understanding between the parties but instead a firm agreement with identified obligations, responsibilities and structures that tantamount to an agreement.

[53] It was not in dispute that the validity of the third supplemental agreement had expired on 31 December 2002 and the fourth supplemental agreement to the MOU was prepared and sent to defendants but never executed. Parties had, after expiry of third supplemental agreement, been dealing with the State Government, UPEN and EPU to finalize the concession agreement until the first defendant wrote to the plaintiff on 9 May 2002 informing the company that the MOU had lapsed or terminated. This precipitated the plaintiff to reply that the termination of the MOU was unlawful and went on with its work in the consortium to which defendant (1) indicated that they will not be attending any of those meetings from then on. For fear of losing its stake in the concession plaintiff wrote to defendants for a meeting to sign the Shareholders' Agreement which was not responded.

[54] On these facts, plaintiff contended the conduct of the defendants were such that they are now estopped from claiming that the MOU had lapsed. Despite not signing the fourth supplemental agreement, the defendants merely kept silent and continued to attend the meetings based on the State Government's extension of the concession for another six months till 30June 2003.

[55] The plaintiff relies on the case of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 which held that primarily all that a litigant who invokes the doctrine of estoppel must do is to show that he was so influenced by the encouragement or representation that it would be unconscionable for the representor to enforce his strict legal rights. There is no need to show that he was induced to act in a particular way. To further support their contention they cited the cases of *Teh Poh Wah v Seremban Securities Sdn Bhd* [1996] 1 MLJ 701 and *Lim Keng Siang & Anor v Yeo Ah Tee* [1983] 2 MLJ 39 to name a few. I find that estoppel by conduct had been rightly raised by the plaintiff. If the defendants had wanted to use cl (5) of the MOU ie termination upon lapse of six months of the third supplemental agreement, they should at the earliest instance after 31 December 2002 when the MOU terminates by affluxion of time, disassociate themselves instead of attending to the finalization of the concession with the State and Federal EPU until even in April 2003.

[56] In the circumstances, I am satisfied that there is a bona fide serious issue to be tried ie whether the MOU has lapsed on 31 December 2002 or had been extended by conduct of the first defendant at least until 30 June 2003 ie the extension period then granted by State Government to the concession company.

[57] Parties submitted at length whether the MOU is a legally binding agreement and authorities were cited by both sides.

[58] Whether an MOU is a binding agreement, the court must look at the terms of the agreement (see *Lim Hong Liang & Anor v Tan Kim Lan @ Tan Kim Leng & Anor* [1997] 5 MLJ 157).

[59] Defendants' counsel invited the court to look at cl 2.1 which is:

> 2.1 The parties shall hold discussions and negotiate with each other with a view to completing and finalising a formal shareholders' agreement setting forth in detail the rights duties and liabilities of each of the parties as shareholders of the company so that the objective as set out in this memorandum is attained upon the terms and conditions to be contained in such formal agreement.

[60] On this clause alone the defendants' counsel submitted that since it is an agreement to agree it is not binding. Only at this inter parte stage the plaintiff exhibited the draft Shareholders' Agreement and correspondence which showed terms that are yet to be finalized.

[61] The plaintiff on the other hand contended that the MOU establishes their right to 30% interest in the consortium or alternatively if the Principal Agreement is the consideration, the RM5m part payment of the RM106m is the consideration towards its shareholding in the consortium.

[62] I observed that the authorities submitted by all the parties are mostly after trial. Looking at the MOU it is clear that it primarily necessitates the signing of a shareholders' agreement which terms are still at large and subject to agreement by both parties. It is not just a mere formality. However, it is still the duty of the court to determine whether on the factual matrix it does give such rights for an extension of six months to the plaintiff

[63] I am mindful at this stage of the interlocutory application where pleadings and evidence are incomplete, I should refrain from making any determination on the merits of the claim. Further also at this stage of the proceeding it is not the function of the court to come to any specific finding of facts or conclusion. As long as the claim is not frivolous or vexatious this should be dealt with at the trial.

Specific performance of MOU

[64] The plaintiff's claim is for specific performance of the MOU. It would mean ordering the parties to negotiate and agree on the terms of the Shareholders' Agreement setting forth the right, duties and liabilities of each of the parties as shareholder of the company especially their 30% stake in the consortium when parties were known not to be able to come to an agreement on fundamental terms in admitting the plaintiff into the consortium primarily the payment of RM106m under the Principal Agreement.

[65] The defendants' counsel submitted at length on the impossibility of grant for specific performance. They cited s 20(1)(b), (c) and (g) of the Specific Relief Act 1950. On perusal of the draft Shareholders' Agreement I find that for the successful implementation of the consortium, besides signing of the Shareholders' Agreement, parties shall, concurrent with that execution, execute two further shareholder agreements under the terms of which they shall participate as shareholders in two companies ie the water treatment company and the operation and maintenance company where the plaintiff would hold controlling interest (cl 8.2). This indeed is an added obstacle for any grant of specific performance as the draft agreements are still forthcoming.

[66] I agree the MOU is not capable of being specifically enforced under those provisions of the Specific Relief Act 1950 as submitted above. Counsel also made reference to s 21(2)(a) of the Act where the court in the exercise of its discretion may refuse to grant specific performance where the circumstances under which the contract was made are such as to give the plaintiff an unfair advantage over the defendant though there may be no fraud or misrepresentation on the plaintiff's part. As the Principal Agreement brought to light the procurement sum of RM106m which the plaintiff subsequently attempted to reduce but not agreed to by defendants' directors with the resulting termination of the Principal Agreement, the plaintiff should not benefit from it to secure their 30% share as it would tantamount to unfair advantage over the defendants.

[67] If a contract is such as not to be capable of being specifically enforced no injunction can be granted to prevent its breach (*Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283).

[68] In *Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia* [1988] 1 MLJ 302, the Supreme Court (as it then was) set aside an interlocutory injunction granted by the High Court pending the trial since the relief of specific performance sought could not be granted in a contract for service. Likewise in *Tunku Kamariah Aminah Maimunah Iskandariah bte Sultan Iskandar v Dato James Lim Beng King* [1989] 2 MLJ 249 where sale of shares were subjected to approval of the Minister of Finance and could not be specifically enforced in view of s 24(e) of the Contracts Act 1950, the interlocutory injunction was set aside.

[69] Besides it would be futile to grant specific performance of the MOU since the plaintiff and the first defendant are no longer approved members of the consortium as determined by the State Government at its Exco meeting on 21 May 2003. The court will have to consider the practical realities of the case and this is one where the court would also refuse specific performance and damages would be an adequate remedy.

Non Disclosure

[70] The defendants averred that there was material non disclosure by the plaintiff when applying for the ex parte injunction, as the plaintiff has a duty to inform the court of any defences the defendants are likely to have, to oppose the injunction application if it was inter partes instead.

[71] The first and third defendants went on to add that the Principal Agreement was not referred to at all in the statement of claim, application for ex parte injunction and the supporting affidavit. Neither was there any mention of Tan Sri Rozali, regardless of the fact that, as Executive Chairman of the plaintiff, he controls the plaintiff and nominated the company to participate in the concession. Since there was no mention of Tan Sri Rozali by the plaintiff, the saga of the plaintiff's participation in the consortium, the offer by Tan Sri Rozali to pay RM106m to the consortium leader to make the plaintiff part of the consortium and the ensuing failed attempt by Tan Sri Rozali to reduce the initial RM106m offer was totally blacked out.

[72] The defendants also contended that this is a material deliberate non disclosure. It was deliberate because Ruslan bin Hassan, the deponent of the plaintiff's affidavit is the plaintiff's Executive Vice Chairman, and was involved in various meetings with the plaintiff to discuss the terms of the Principal Agreement, including Tan Sri Rozali's refusal to pay the RM106m. It was material because:

(a) without the Principal Agreement where it incorporated the parties' intention that the plaintiff could participate in the concession upon Tan Sri Rozali's agreement to pay the RM106m, the first defendant

would never have allowed the plaintiff to participate in the concession or the concession company; and

(b) the first defendant would never have signed the MOU that allowed the plaintiff to subscribe for 30% of the share capital in the concession company at nominal value only.

[73] The defendants contended that by not disclosing the Principal Agreement which had been terminated requiring Tan Sri Rozali to transfer plaintiff's 30% share in the concession to the first defendant, the plaintiff company had come to court with unclean hands. To avail itself of this equitable relief the plaintiff must disclose all material facts.

[74] The second defendant's application is based on the plaintiff's material non disclosure in not bringing to the attention of the court the salient terms of the MOU and the Principal Agreement. The second defendant adopts the arguments put forth by learned counsel of the first and third defendants on these issues.

[75] Both counsel for the defendants submitted numerous authorities which held that on this ground alone the injunction should not be continued on the inter paries application even if the plaintiff had merits despite the deliberate material non disclosure.

[76] *Ali & Fahd Shoboksi Group Ltd v Moneim & Ors* [1989] 2 All ER 404, the issue before the court was whether continuation of Mareva order obtained ex parte should be refused on the ground that the ex parte order had been obtained without proper disclosure of material facts. Mervyn Davis J at p 412 says as follows:

> I now mention *Behbehani v Salem* [1989] 3 All ER 143. This was a case in the Court of Appeal where there were considered the circumstances in which it is appropriate for the court, having discharged a Mareva injunction for non-disclosure, immediately to regrant substantially the same injunction. Nourse LJ said (at 156):
>
> 'I agree that in order to get at the principles of discretion on which the court acts in a case of this kind we need not now look further than the decision of this court in *Brink's-MAT Ltd v Elcombe* [1988] 3 All ER 188 at 193, [1988] 1 WLR 1350 at 1357, where they are summarized in the passage in the judgment of Ralph Gibson LJ which Woolf LJ has read. In para (vii) of that summary we find that: "The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms: '...when the whole of the facts, including that of the original non-disclosure are before it, [the court] may well grant such a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed.' (See *Lloyds Bowmaker Ltd v Britannia Arrow Holdings plc (Lavens, third party)* [1988] 3 All ER 178 at 183, [1988] 1 WLR 1337 at 1343–1344 per Glidewell LJ.)" Although it would not be correct to treat Glidewell LJ's statement of the circumstances in which the court may exercise its discretion as being exhaustive, it is, I think, likely to have relevance in many of these cases, and it is certainly a useful starting point in this. I should add that in the *Brink's-MAT* case all three members of this court defined an

A innocent non-disclosure as one where there was no intention to omit or withhold information which was thought to be material. Since it is accepted both that the non-disclosure justified or required the immediate discharge of the ex parte order and that the whole of the facts are now before the court, the questions to which we should start by addressing ourselves are, first, whether it was innocent and, second, whether an injunction could properly have been granted if full
B disclosure had been made to Roch J.'

So I come to the conclusion that I must consider (a) whether the non-disclosure complained of was innocent and (b) whether an injunction could properly have been granted if full disclosure had been made to Peter Gibson J. If (a) and (b) are answered in the affirmative, then the court has a discretion.

C **[77]** The inter partes application there was dismissed. Although the above case is for a Mareva injunction the legal principles are general and apply to all ex parte applications.

[78] In dealing with non-disclosure, the Federal Court in *MRK Nayar v Ponnusamy & Ors* [1982] 2 MLJ 174 held that when an interlocutory injunction
D is sought the balance of convenience will be the overriding consideration but once the court is satisfied that there was suppression of material facts, the question of balance of convenience does not arise for consideration.

[79] Order 29 r 2A of the Rules of High Court 1980 requires full and frank disclosure at the ex parte stage and they must be strictly complied by parties
E and enforced by courts. This includes drawing attention of court to all relevant facts so as not to mislead the court into making an order that it would not have made including any answer asserted or what the plaintiff thought likely to be asserted by the defendant either to the claim in the action or for the interlocutory injunction. Failure to do so itself is sufficient ground without considering the merits to dissolve the injunction (*Bakmawar*
F *Sdn Bhd v Malayan Banking Bhd* [1992] 1 MLJ 67). Vohrah J in *Lim Sung Huak & Ors v Sykt Pemaju Tanah Tikam Batu Sdn Bhd* [1993] 3 MLJ 527 spoke with approval the principles in *R v Kensington Income Tax Commissioners, ex p Princess Edmond de Polignac* [1917] 1 KB 486 before holding that if the applicant makes misleading averment or suppress any fact the injunction is liable to be set aside without regard to merit

G **[80]** The pertinent question is whether plaintiff had exercised good faith and discloses his case fully. The plaintiff contended that the Principal Agreement was a personal agreement between the three parties and is supposed to be confidential and not to be disclosed even to the court.

[81] As to the claim of confidentiality cl 8.10 of the Principal Agreement
H reads as follows:

The parties hereby agree that this Agreement and matters set out herein shall remain confidential and *no announcement* or *other publicity* relating to any matter referred to in this Agreement shall be made or issued by or on behalf of either party without prior written agreement of the other parties hereto. (Emphasis added.)

I **[82]** I would have thought that the limitation here on confidentiality is more of a commercial restriction. Whatever it may be, it is onerous on plaintiff to make disclosure notwithstanding cl 8.10 since it does not preclude

its use in court especially when there is a duty to disclose facts at least its termination and consequences of its termination on plaintiff's participation in the consortium and concession.

[83] I find this Principal Agreement is materially relevant to the plaintiff's participation in the concession. It struck at the core of the MOU. As this Principal Agreement had been terminated, the plaintiff's 30% share in the concession company shall be transferred by Tan Sri Rozali back to the concession company within 30 days of its termination (cl 3.2(b)) where which there would be nothing to be specifically enforced under the MOU.

[84] I must state that if these facts had been brought to my attention, I would not have granted the ex parte interlocutory injunction. The non-disclosure was not innocent but deliberate since the Principal Agreement forms the substratum of the MOU. On this ground alone it is sufficient that the interlocutory injunction should not continue.

Delay

[85] The defendants contended that there was deliberate delay by the plaintiff in filing this suit before this court, since they had known about the plans to bring Sarawak Concrete into the consortium way back in January this year and that the MOU had lapsed on 31 December 2002. In fact, Tan Sri Rozali had said that the defendants were free to bring in other investors in their meeting on 27 January 2003. This was stated in Dato' Azhar's and Dato' Dr. Rahiman's letter to Tan Sri Rozali dated 30 April 2003 ('AH-5' of encl 13).

[86] If there was any indication from the defendants that the MOU had lapsed and the defendants not bound by it, was the letter of 9 May 2003. Until late April the defendants were still attending meetings with the State Government together with the plaintiff. There was no inordinate delay on the plaintiff's part in making this application. For delay to operate as a bar it was essential that it should prejudice the defendant. The defendants were not disadvantaged by the delay.

Balance of Convenience

[87] On the balance of convenience, the plaintiff stated that the agreement between the defendants and the third party will be detrimental to the plaintiff, a company listed in the KLSE. It will result in damages that cannot be compensated by costs.

[88] Further, the plaintiff said that the balance of convenience is in favour of the plaintiff because if the injunction is allowed the status quo could be maintained until the hearing of the plaintiff's suit. The defendants will not be adversely affected whereas the plaintiff will incur irreparable damages.

[89] The first and third defendants said that the balance would tilt in favour of not granting the injunction since to grant it would mean that the privatization would be further delayed, and will frustrate the State Government's policy and be detrimental to public interest at large. This, coupled

with the fact that the third defendant is a trust foundation and nominated by the State Government to hold a 10% share in the concession company for the State Government, further bolsters the argument that the injunction will affect the State Government.

[90] The plaintiff contended that the balance of convenience lies in its favour and status quo should be maintained. The injunction merely prohibits the defendants from dealing with the State Government without the plaintiff's involvement. In support, counsel for plaintiff submitted a string of authorities.

[91] When considering balance of convenience, one of the factors to be considered is whether damages would be a sufficient remedy.

[92] I took into consideration that since the state Government had decided at its Exco meeting of 3 June 2003 to remove the plaintiff and the first defendant from the consortium, the injunction itself would be academic between them. In any event the court would not enforce this MOU against the will of the State Government.

[93] I also find that a continuation of the injunction will delay the long awaited desire of the State Government to proceed with the privatization of the water supply in the state and it would be against public policy to so impose on the State Government. The exclusion of the plaintiff and the first defendant was done to prevent any dispute between them to hold back the implementation of the concession which was at the penultimate stage.

[94] In determining the balance of convenience any question going to the public interest may in an appropriate case be taken into account (*Keet Gerald*'s case). Such privatization of the water supply in the state would definitely benefit the public and any delay in its implementation would frustrate public interest. In *Tan Suan Choo v Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323, the High Court refused to grant an injunction because of the wider public interest of ensuring safety of adjoining houses. Likewise in *Saw Seng Kee v Director of Land & Mines, Penang & Ors; Teoh Han Che v Director of Land & Mines, Penang & Ors* [1987] 1 MLJ 80, the injunction was refused because of the public interest factor.

[95] I would like to reiterate that since the MOU is wholly dependant on the Principal Agreement which had been terminated, this will not be a proper case where the court will grant specific performance besides the difficulty over the terms of the Shareholders' Agreement which is yet to be signed. The strained relationship between the plaintiff and first defendant particularly would pose as an obstacle to the settlement of the terms of all the Shareholders' Agreement.

[96] Having considered the practical reality of this case the justice of this case lies in not granting the continuation of the injunction. Under the circumstances, plaintiff would be adequately compensated with damages if they succeed in the action.

[97] For the above reasons, I order the ex parte injunction and the holding over be discharged as against the first and third defendants and consequently

in respect of the second defendant, grant its application in encl 11 to set aside the ex parte injunction with cost and damages to be assessed by the senior assistant registrar.

Ex parte injunction set aside.

Reported by Sally Kee Seok Meng